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In the Supreme Court of the United States

October Term, 1985

METROPOLITAN EDISON COMPANY,
Appellant
v.
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee
OFFICE OF CONSUMER ADVOCATE et al.,
Intervenors

PENNSYLVANIA ELECTRIC COMPANY,
Appellant
v.
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee
OFFICE OF CONSUMER ADVOCATE et al.,
Intervenors

On Appeal From the Supreme Court of Pennsylvania

MOTION OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION TO DISMISS OR AFFIRM

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The Appellee Pennsylvania Public Utility Commission respectfully moves pursuant to Rules 16.1(b) and (d) to dismiss the appeal or for summary affirmance of the final judgment of the Supreme Court of Pennsylvania on the grounds (1) that the decision below correctly applied the relevant constitutional principles, (2) that the question presented does not require plenary consideration by this Court, and (3) that an attempted appeal, based on the same question presented and the same holding arising out of New Jersey, was dismissed by this Court for want of a substantial federal question.

COUNTER-STATEMENT OF THE CASE

Any statement of facts regarding this appeal must begin with the March 28, 1979 nuclear accident at Three Mile Island Generating Unit No. 2 (TMI-2). As a result of that accident TMI-2 sustained serious damage and has not generated electric power since that date. The accident involved the near melt-down of a nuclear reactor, and was the most serious in the history of commercial nuclear power generating facilities in the United States. Moreover, the severity of the accident has raised a host of difficult issues regarding plant safety, management integrity, public utility rate regulation and national energy policy. The following represents a concise chronology of the facts related to the rate regulation issues raised by the accident.

Metropolitan Edison Company (Met Ed) and Pennsylvania Electric Company (Penelec), wholly-owned subsidiaries of General Public Utilities Corporation (GPU), are public utilities subject to the jurisdiction of the Pennsylvania Public Utility Commission (Commission). In its initial response to the accident, the Commission, by order adopted April 19, 1979, reduced Met Ed's rates by setting temporary rates based on the exclusion from cost of service of Met Ed's 50% share of TMI-2 capital and operating costs. Similarly, by order adopted April 25, 1979, the Commission reduced Penelec's rates by setting temporary rates based on the exclusion from cost of service of Penelec's 25% share of TMI-2 capital and operating costs. These actions were in accord with the well-established principle that consumer rates should include only

the legitimate costs associated with facilities used and useful in providing service to the public. *Philadelphia Electric Co. v. Pa. P. U. C.*, 61 Pa. Commonwealth Ct. 325, 329, 433 A.2d 620, 623 (1981).

After further investigation, by order adopted June 15, 1979 at Docket No. I-79040308, the Commission determined that TMI-2 was no longer used and useful in the public service and that the existing temporary rates for Met Ed and Penelec should be made permanent. At the same time, the Commission also determined that customer rates should be increased, through operation of the energy cost rate (ECR), to cover the substantial cost of additional electric power purchased from other utilities to replace the electric power formerly generated by TMI-2. With respect to TMI-1, that unit was out of service for a scheduled refueling when the accident occurred but was not damaged in the course of the TMI-2 accident. Although TMI-1's return to service was being delayed due to its design similarity with and close proximity to TMI-2, GPU president Herman Dieckamp testified on behalf of Met Ed and Penelec that resumption of electric power generation at TMI-1 would occur as early as August 1979 and certainly no later than January 1, 1980. Based principally upon this assurance, the Commission concluded that no action with respect to TMI-1 was warranted at that time. *Pa. P. U. C. v. Metropolitan Edison Co. and Pennsylvania Electric Co.*, 29 PUR 4th 502 (1979).

During the succeeding months several additional matters arose and were consolidated with the Commission's continuing investigation at Docket No. I-79040308: (1) on September 20, 1979 the Commission ordered Met Ed and Penelec to show cause why TMI-1 should be con-

sidered used and useful in the public service, (2) on November 1, 1979 the Commission ordered Met Ed only to show cause why its certificate of public convenience should not be revoked and (3) also on November 1, 1979 Met Ed and Penelec petitioned the Commission for an increase in their existing energy cost rates. By order adopted May 23, 1980, after extensive hearings, briefing and oral argument on these issues, the Commission reached the following conclusions.

First, the Commission concluded that since there was no immediate and foreseeable threat to the continued provision of adequate and reliable service at reasonable rates, Met Ed's certificate of public convenience should not be revoked. The record demonstrated that with the cash available from operation of the energy cost rate and short-term loans from a consortium of banks, Met Ed was able to finance the necessary outside power purchases to maintain service to the public.

Second, the Commission concluded that TMI-1 was no longer used and useful in the public service. The Commission found that TMI-1 would return to service no earlier than January 1, 1981 (an outage of nearly two years) and that proceedings before the Federal Nuclear Regulatory Commission (NRC) regarding plant safety and management integrity threatened to delay TMI-1's return to service well beyond 1983. Pursuant to this finding, the Commission reduced the base rates of Met Ed and Penelec by setting temporary rates which excluded from cost of service the capital and operating costs of TMI-1.

Third, the Commission concluded that Met Ed and Penelec should be allowed to recover on a fully current

basis all of their purchased power costs through a further increase in their energy costs rates, plus all of their previously deferred energy costs over an 18-month period by means of a surcharge to base rates. This action allowed Met Ed and Penelec to continue collecting sufficient revenues from customers to fund all of the additional purchased power costs arising from the out-of-service status of TMI-1 and TMI-2. *Pa. P. U. C. v. Metropolitan Edison Co. and Pennsylvania Electric Co.*, 37 PUR 4th 77 (1980).

On July 29, 1980, in response to the Commission's May 23, 1980 order, Met Ed and Penelec filed complaints against the temporary rates set in that order alleging that such rates were unjust and unreasonable. They also filed the two rate cases which are the subject of this appeal: a requested $76.5 million increase in base rates for Met Ed and a requested $67.5 million increase in base rates for Penelec. The requested rate increases were grounded upon general increases in capital and operating costs associated with non-TMI plant that were experienced since the last rate cases, plus recovery of the capital and operating costs of TMI-1 based on the utilities' estimate that TMI-1 would return to service shortly after March 31, 1981—the end of the future test year in these rate cases.[1] No claim was made for the capital and operating costs of TMI-2 or for the uninsured costs of TMI-2 decontamination.[2]

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[1] TMI-1 did not return to service until October 3, 1985, an outage of more than six years.

[2] According to GPU, the total cost of TMI-2 decontamination will be approximately $1 billion; TMI-2, of course, remains out of service.

The complaints against temporary rates and the two rate cases were consolidated for hearing purposes. By orders adopted June 8, 1981, the Commission dismissed the complaints against the temporary rates set May 23, 1980, holding that Met Ed and Penelec had not met their burden of proving that the temporary rates were unjust and unreasonable during the time they were in effect. On appeal to the Commonwealth Court of Pennsylvania the Commission's decision was affirmed; no further appeal was taken regarding the temporary rates issue.

By order entered July 27, 1981, the Commission concluded its consideration of the two rate increase requests finding that Met Ed and Penelec were entitled to rate increases of $51.8 million and $55.4 million, respectively. Finding that TMI-1 would not return to service during the test year or within a reasonable time thereafter, the Commission held that TMI-1 was still not used and useful in the public service and, therefore, that TMI-1 operating and capital costs should be excluded from the computation of just and reasonable rates. However, in balancing the interests of investors and consumers, the level of consumer rates approved by the Commission included, among other things, $16.5 million per year for TMI-1 restart expenses, relatively high rates of return on the used and useful portion of the utilities' property and full recovery of the additional purchased power costs caused by the out-of-service status of TMI-1 and TMI-2.

On August 17, 1981, Met Ed and Penelec filed with the Commonwealth Court of Pennsylvania petitions for review of the Commission's final rate order entered July 27, 1981. On November 18, 1983, the Commonwealth Court of Pennsylvania affirmed the Commission's rate deter-

minations for Met Ed and for Penelec finding that the Commission did not abuse its discretion in excluding TMI-1 capital and operating costs from the computation of consumer rates and that the actions of the Commission reflect an appropriate balance of investor and consumers interests. *Pennsylvania Electric Co. v. Pa. P. U. C.*, 78 Pa. Commonwealth Ct. 402, 467 A.2d 1367 (1983).

On December 16, 1983, Met Ed and Penelec filed with the Supreme Court of Pennsylvania a joint petition for allowance of appeal, which petition was granted on April 19, 1984. By opinion filed December 9, 1985, the Supreme Court of Pennsylvania also affirmed, finding that the Commission had satisfied the constitutional requirement of "just and reasonable" rates by appropriately balancing investor and consumer interests in its ratemaking determinations. Furthermore, the Court held that the investor interests described in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), were not in and of themselves of constitutional dimension but, rather, "are among the factors to be taken into account in the balancing of interests process." Appellants' Appendix, A1-12.

ARGUMENT

I. As in an Earlier Appeal Arising out of New Jersey Involving the Same Relevant Facts and Holding, This Court Should Dismiss the Appeal for Want of a Substantial Federal Question

The same investor-oriented interpretation of the *Hope* case advanced by Met Ed and Penelec in this appeal has been addressed and rejected by the New Jersey Board of Public Utilities, by the New Jersey Appellate Courts and, by implication, the United States Supreme Court.

Jersey Central Power & Light Company (Jersey Central), another GPU subsidiary, owns the remaining 25% interest in TMI-1 and TMI-2. And, as in Pennsylvania, the New Jersey Board of Public Utilities (New Jersey Commission) removed TMI-1 and TMI-2 from rate base to ensure that Jersey Central's consumers would not bear the double burden of providing the company with capital and operating expenses related to the idle TMI units while at the same time bearing the substantial additional costs of replacing the electric power formerly produced by such units.

On appeal to the Superior Court of New Jersey, Jersey Central argued that the New Jersey Commission failed to establish rates which comported with requirements of the federal and state constitutions under the standards set forth in the *Hope* case. The Superior Court of New Jer-

sey, after analyzing in great detail the *Hope* case, supra, and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), rejected Jersey Central's argument in all respects. The New Jersey Court held that the investor interests described in *Hope* are to be considered only in tandem with consumer interests and that, in and of themselves, investor interests are not of constitutional dimension. *In re Jersey Central Power & Light Co.*, No. A-162-81T2 (July 28, 1983), *cert. den.* 95 N.J. 217, 470 A.2d 433 (1983). In so holding, the New Jersey Court relied upon the following language from the *Permian Basin* case.

> The Commission cannot find its inquiries either to the computation of cost of service or to conjectures about the prospective responses of the capital market; it is instead obligated at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress. Accordingly, the "end result" of the Commission's orders must be measured as much by the success with which they protect those interests as by the effectiveness with which they "maintain credit . . . and . . . attract capital."

Id. at 791. (Footnote omitted.)

After the Supreme Court of New Jersey declined to review the decision, Jersey Central sought an appeal to the United States Supreme Court and offered the following question for the Court's plenary consideration:

> Was the Court below correct in holding that the three investor-interest components of the criteria for determining whether electric utility rates are "just and reasonable" as specified by this court in Federal

> Power Commission v. Hope Natural Gas Company, 320 U.S. 591, 603 (1944) "are not of constitutional dimension", even though rates which would satisfy such investor-interest criteria would not exploit customers?

Jersey Central Jurisdictional Statement, No. 83-1478 (March 4, 1984).

The New Jersey Commission argued in opposition that the Superior Court of New Jersey properly upheld the exclusion of TMI from rate base as no longer used and useful in the public service, that investor and consumer interests were balanced appropriately in its ratemaking determinations and that no substantial constitutional question had been presented. In *Jersey Central Power & Light Co. v. Board of Public Utilities of New Jersey*, 466 U.S. 947 (1984), Jersey Central's appeal was dismissed by this Court for want of a substantial federal question.

Unlike the denial of certiorari, summary disposition of an appeal either by affirmance or dismissal for want of a substantial federal question is a disposition on the merits and, as such, it is binding on the lower Courts. *Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975). Moreover, summary dismissal for want of a substantial federal question rejects the specific constitutional challenge presented and leaves undisturbed the judgment of the lower Court based on the application of established constitutional principles to the current facts. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

The Commission submits that there can be no serious question that the relevant facts and holding in this appeal are identical to those in the appeal arising out of the New

Jersey Commission's ratemaking response to the accident at TMI-2. In each instance, the state regulatory commission excluded from customer rates the operating and capital cost associated with the idle generating facilities at TMI-1 and TMI-2 and, at the same time, allowed customer rates to include the substantial additional costs of purchased power. Moreover, both in New Jersey and in Pennsylvania the Appellate Courts ruled that while the investor interests described in *Hope* are to be considered in discharging their duty to establish "just and reasonable" rates, those investor interests are not, in and of themselves, of constitutional dimension, but must be considered in tandem with consumer interests. The Pennsylvania Supreme Court went so far as to state unequivocally that the holding of the Superior Court of New Jersey is "identical to that which we have reached presently." Appellants' Appendix, A12.

The substantive question presented in this appeal by Met Ed and Penelec is identical to the question presented in the appeal sought by Jersey Central, their sister company, and dismissed by this Court. The only literal difference to be found is an absence of the phrase "even though rates which would satisfy such investor-interest criteria would not exploit consumers" in the version drafted by Met Ed and Penelec. The body of their argument, however, makes clear that this is still an important aspect of the issue as they see it. *See* Jurisdictional Statement, pp. 5, 11, and 16.

Rather than rely on this Court's dismissal of the appeal arising out of the New Jersey jurisdiction, Met Ed and Penelec have simply reasserted the erroneous contention that investor interests are of constitutional di-

mension and may supersede consumer interests under certain circumstances. Indeed, it is only the fortuitous fact that the capital and operating costs of TMI are assigned to two state jurisdictions that allows these companies "two bites at the apple." The Commission suggests that the constitutional arguments raised by Met Ed and Penelec in opposition to consumer rates that exclude the capital and operating costs of the idle TMI units are no more compelling in this instance than when they were first made on behalf of Jersey Central.

Therefore, given the identity of facts and holdings between this appeal and the New Jersey appeal, and this Court's summary dismissal of the New Jersey appeal for want of a substantial federal question, this appeal should be dismissed as well.

II. The Pennsylvania Supreme Court Held Correctly That the Investor Interests Enumerated in HOPE Are Not Paramount, but Are Among the Factors To Be Taken Into Account in Determining Just and Reasonable Rates

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The judgment of the Pennsylvania Supreme Court, which upheld rate orders excluding from consumer rates the costs associated with the idle generating facilities at TMI-1 and TMI-2, is consistent in all respects with the precedents of this Court and with the protections afforded to investors and consumers through the Fifth and Fourteenth Amendments to the United States Constitution.

In the landmark case of *Smyth v. Ames*, 169 U.S. 466 (1898), the United States Supreme Court established that the constitutional standard for judging the reasonableness and adequacy of public utility rates was grounded upon

"the fair value of the property being used by it for the convenience of the public." *Id.* at 546. And, although the particular method of determining a "fair value" rate base outlined in the *Smyth v. Ames* decision has since lost its importance, the concept of a properly determined rate base, a rate base consisting of used and useful property, has never lost its vitality. Indeed, Met Ed and Penelec are seriously mistaken in asserting that the *Hope* decision has overruled this principle.

Federal case law on the subject of ratemaking and confiscation, both before and after *Hope*, has consistently held to the principle that a utility is entitled to a return only on property that is used and useful in the public service. In *Bluefield Water Works v. PSC of West Virginia*, 266 U.S. 679, 692-93 (1923), this Court held that a public utility is constitutionally entitled to rates sufficient to earn a return on the value of property which it employs for the convenience of the public equal to the returns on investment earned by firms of similar risk. Later, in *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938), this Court held that the reasonableness of rates was to be judged in relation to the property used and useful in the public service.

> *The Rate Base.* As of right safeguarded by the due process clause of the Fifth Amendment . . . appellant is entitled to rates . . . sufficient to yield a reasonable rate of return upon the value of property used, at the time it is being used, to render the services (citations omitted). But it is not entitled to have included any property not used and useful for that purpose.

Id. at 475.

> And after *Hope*, the principle remained the same.
>
> Although methods for determining values of rate base items have evolved since Smyth v. Ames, the precept endures that an item may be included in rate base only when it is "used and useful" in providing service. In other words, current ratepayers should bear only legitimate costs of providing service to them.

Tennessee Gas Pipeline Co. v. FERC, 606 F.2d 1094, 1109 (D.C. Cir. 1979), *cert. den.*, 445 U.S. 920, 447 U.S. 922 (1980). Similarly, in *Kentucky Utilities Co. v. FERC*, 760 F.2d 1321, 1324 n.4 (D.C. Cir. 1985), the court noted that the used and useful principle established in *Smyth v. Ames* remained as "a bedrock principle of utility rate regulation" which required that "costs associated with electric power plants be paid by the ratepayers who benefit from the plant."

In this case there can be no doubt that the Commission acted reasonably and within its sound discretion when it determined that TMI-1 would not provide electric power to consumers in the reasonably foreseeable future and, therefore, that TMI-1 was not used and useful in the public service. The record demonstrated without contradiction that TMI-1 had been out of service since March 28, 1979 (the date of the nuclear accident at TMI-2), that the utilities' own estimate of the date TMI-1 would return to service was toward the end of the fourth quarter of 1981 (approximately nine months after the end of the future test year) and that the utilities' estimate was based on certain optimistic assumptions regarding proceedings before the NRC. As it turns out, TMI-1 did not return to service until October 3, 1985. The rates established by the

Commission, and approved by the Pennsylvania Supreme Court, properly excluded the capital and operating costs of non-used and useful property in discharging its responsibility to establish just and reasonable rates.

Citing certain language in the 1944 *Hope* decision regarding the nature of investor interests, Met Ed and Penelec suggest that they are constitutionally entitled to rates sufficient to assure their financial integrity regardless of the used and useful status of their property, provided that such rates do not "exploit consumers." Jurisdictional Statement, p. 16. Their theory of ratemaking is without foundation.

After nearly fifty years of judicial review regarding details of the ratemaking methods used by regulatory commissions, the Court abandoned this approach and held in *Hope* that, where the legitimate interests of investors are fully satisfied at the level of rates established by the regulatory commission, the utility could not sustain a constitutional challenge to the ratemaking methods used in arriving at those rates.

> Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid even though they might produce only a meager return on the so-called "fair value" rate base.

Id. at 605.

Thus, given the strong financial condition of the utility in that particular case, the so-called "end result", the rates prescribed by the regulatory commission could not

be held as unjust and unreasonable from the investor viewpoint. So understood, it becomes clear that the *Hope* "end result" test is not a substantive rule of ratemaking, but rather a doctrine of judicial restraint. In those cases where the interests of the complaining party are fully satisfied, as they were for the utility in *Hope*, the Court will withhold judicial review of the ratemaking methods used. On the other hand, where the legitimate interests of the complaining party are not met, judicial review remains available to determine whether the regulatory commission properly balanced the competing interests involved.

Investor interests, however, are not paramount. As explained by the Pennsylvania Supreme Court:

> The decision in Hope enumerated certain legitimate areas of concern for investors, these being that a company have sufficient revenue to cover operating and capital costs, that the return on equity be commensurate with returns on enterprises having similar risks, and that the company be able to maintain credit and attract capital. These investor interests are appropriate factors to be weighed in the balancing analysis under Hope, but they are not, in themselves, controlling, for other factors must be taken into account.

Appellants' Appendix, A7.

Rather, in determining just and reasonable rates, the competing interests of investors and consumers must be balanced at each step of the ratemaking process, *Permian Basin* at 790-91, including the determination of the rate base on which a return may be earned. Moreover, con-

sumer interests are not to be discarded if the financial interests of the utility are in peril.

The erroneous interpretation of the *Hope* case advanced by Met Ed and Penelec was addressed and discarded by the United States Supreme Court only one year after *Hope*. In *Market Street Railway Co. v. Railroad Commission*, 320 U.S. 548 (1945), the court dismissed the argument of an ailing transportation utility that regardless of the current depressed value of its properties, it was entitled to a return "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." In rejecting the utility's argument the court held that the considerations in *Hope*

> . . . concerned a company which had the advantage of an economic position which promised to yield what was held to be an excessive return on its investment and on its securities. They obviously are inapplicable to a company whose financial integrity already is hopelessly undermined, which could not attract capital on any possible rate, and where investors recognize as lost a part of what they have put in . . . . Without analyzing rate cases in detail, it may be safely generalized that the due process clause has never been held by this Court to require a commission to fix rates on the present reproduction value of something no one would presently want to reproduce . . . or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities already are impaired. *The due process clause has been applied to prevent governmental destruction of existing economic value. It has not and cannot be applied to*

> *ensure values or to restore values that have been lost by the operation of economic forces.*

Id. at 566-67. (Citations omitted. Emphasis supplied.)

The major error of the theory advanced by Met Ed and Penelec lies in assuming that the *Hope* case, because it carefully described the parameters of investor interests, places *primary* importance on investor interests and therefore eliminates the need to determine the utility's used and useful rate base upon which investors may earn a return. Thus, according to their strained reading of the *Hope* case, the Commission may remove non-used and useful property from rate base but, if the effect is significant damage to investor interests, the Commission is constitutionally required to increase rates to such an extent that the damage to investor interests is cancelled out. The Pennsylvania Supreme Court recognized correctly that if rates which otherwise properly excluded TMI costs from consumer rates had to be adjusted upward to preserve the utility's financial integrity, "the effect upon rates would be the same as if portions of the non-useful property, such as the Three Mile Island nuclear reactors, had not been excluded from the rate base in the first instance." Appellants' Appendix, A9. For all practical purposes, the removal of non-used and useful property from rate base becomes a nullity.

Nor is there any merit to the contention that the Commission was obligated under the United States Constitution to adjust rates upward so long as "such rates would not exploit customers." Jurisdictional Statement, p. 5. Apparently, the standard of consumer exploitation envisioned by Met Ed and Penelec would compare their

rates with "those of other utilities in Pennsylvania and neighboring states." Jurisdictional Statement, p. 10.

In addition to disregarding whether or not the utility's property is used and useful in providing service to the public, this putative standard would effectively set rates based on those of the worst managed and highest cost utilities in the region. Each public utility operates in a different territory, under different operating conditions and, therefore, under different cost conditions. Cost of service is the foremost standard for the establishment of public utility rates. A public utility is entitled to rates that provide recovery of all of its legitimate operating expenses, depreciation and taxes, plus an *opportunity* to earn a fair return on the property which is used and useful in the public service; this represents the utility's revenue requirement. *See* C. Phillips, *The Regulation of Public Utilities* (1984), pp. 157-60; P. Garfield and W. Lovejoy, *Public Utility Economics* (1964), pp. 44-46. There is simply no basis in public utility law or in constitutional law for the proposition that the TMI-1 related costs legitimately disallowed by the Commission may be recaptured by higher consumer rates if the rates do not exceed those of some other utility in the region.

Met Ed and Penelec are also incorrect in their assertion that the used and useful standard represents a "breach of the implicit and fundamental bargain between investors . . . and consumers." Jurisdictional Statement, p. 15. The used and useful standard is soundly based in that it reflects the principle that, in fairness, consumers should not be required to subsidize utility property that does not provide service to the public. Appellants' Appendix, A10. Investors, on the other hand, are risk-takers

by nature, and the fair return portion of a utility's revenue requirement is intended to compensate investors for a variety of business risks, including the risk that the utility's property will not provide service. Excluding TMI-1 costs from consumer rates is fully consistent with the rights of consumers and the risks undertaken by investors.

Furthermore, the Court should note that the financial problems faced by Met Ed and Penelec run far deeper than the exclusion of TMI-1 costs from consumer rates. At the root is the March 28, 1979 nuclear accident at TMI-2; that generating unit sustained serious damage and has been out of service since that date. The operating and capital costs of TMI-2 are not in customer rates, nor have Met Ed and Penelec made any direct claim for these substantial costs in the rate cases. Nevertheless, these substantial costs continue to accrue and serve to weaken their financial position. Then there is the problem of radioactive decontamination. Before TMI-2 can return to service, TMI-2 must be decontaminated at a total cost that may exceed $1 billion. No claim was made in the rate cases for decontamination expenses; that potential liability, however, places a tremendous strain on the financial health and resources of these utilities.

The Commission submits that no principle of constitutional law mandates the replacement of traditional ratemaking principles with an approach that would nullify all otherwise appropriate ratemaking determinations whenever necessary to preserve the financial integrity of the utility. Indeed, such an approach would shift the risk of financial failure from investors to consumers and, in effect, *guarantee a fair return to investors.* This would

be inconsistent with the basic risks undertaken by all private firms in the American economy and, more important, would be inconsistent with the limits of the constitutional protections available to privately owned utilities and their investors.

No such constitutional protection from financial failure can be found in *Hope* or any other decision of this Court. On the contrary, as noted by the Pennsylvania Supreme Court, "the express language of the *Hope* decision weighs against regarding utilities as a protected class of business enterprises which are to be relieved from such normal business risks." Appellants' Appendix, A8. *Hope* teaches that, notwithstanding the regulatory commission's duty to establish just and reasonable rates, "regulation does not insure that the business shall produce net revenues." *Id.* at 603. Moreover, the decision carefully points out that since the investor interests described previously were fully satisfied for the natural gas utility in that case, it was unnecessary to consider "conditions under which more or less might be allowed" or to consider any alternative "rate base on which the return is computed." *Id.* at 603. The *Hope* decision recognizes that there may be constitutionally permissible circumstances in which investor interests are not fully satisfied. As noted in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942), cited with approval in *Hope*, "the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business."

In this case, it was impossible for the Commission to set rates that would place Met Ed and Penelec in the strong financial condition described in *Hope* without ex-

ploiting consumer interests. Rates sufficient to assure confidence in the financial integrity of these troubled utilities would have required charging consumers with TMI-1 costs, TMI-2 costs and the uninsured portion of TMI-2 decontamination costs, thereby forcing consumers "to ensure values . . . that have been lost by the operation of economic forces." *Market Street* at 567. Indeed, in an earlier brief below Met Ed and Penelec readily admitted that not even the *full measure* of the rate increase sought would have restored Met Ed to financial health.

At the same time, investor interests were not ignored by the Commission in its ratemaking determinations. The record demonstrates that investor interests were balanced against those of consumers at each step of the ratemaking process. Indeed, the Commission took several specific and extraordinary actions designed to aid Met Ed and Penelec in their recovery from the financial problems caused by the nuclear accident at TMI-2.

Despite the out-of-service status of TMI-1, the Commission's final rate orders included $11 million for Met Ed and $5.5 million for Penelec in operating expenses for TMI-1 to aid restart. Thus, while TMI-1 operating and capital costs are excluded from cost of service, $16.5 million in operating expenses are added back to advance the date on which TMI-1 will again be in service and in customer rates.

Second, any consideration of the appropriate balancing of investor and consumer interests must include the fact that for the 14-month period from March 28, 1979 (the date of the accident at TMI-2) through June 1, 1980 (the date TMI-1 costs were removed from customer rates), customer rates included the operating and capital

costs of TMI-1 even though it was out of service during that entire period. At the same time, the Commission had allowed increased customer rates to fund the additional costs of purchased power necessary to replace the generating capacity of TMI-1 and TMI-2.

Third, the Commission's final rate orders provided relatively high rates of return on the common equity investment in used and useful property: 16.5 percent for Penelec and 17.0 percent for Met Ed. At that time, 17.0 percent was the highest rate of return ever allowed a Pennsylvania utility and reflects the substantial financial risks being faced by Met Ed.

Fourth, the Commission left undisturbed the utilities' energy cost rate which generates revenues from consumers sufficient to fund all of the additional purchased power costs caused by the out-of-service status of TMI-1 and TMI-2. In this respect, consumers have borne a substantial portion of the risk of plant failure. The record demonstrates that during the test year in these rate cases, customer rates included purchased power costs of $109 million for Met Ed and $45 million for Penelec.

Finally, the Commission's final rate order provided for reserve capacity expenses for ratemaking purposes in excess of the actual reserve capacity expenses that Met Ed and Penelec would incur during the test period. By ordering normalization of certain reserve capacity expense credits, the Commission had in effect caused customers to loan Met Ed and Penelec $34 million per year to be paid back at some future date in order to improve the utilities' cash flow.

These items demonstrate convincingly the Commission's grave concern with the financial well-being of Met

Ed and Penelec. Without writing a "blank check" to solve all the serious financial problems caused by the March 28, 1979 nuclear accident at TMI-2 (the out-of-service status of TMI-1 and TMI-2, the need to purchase large amounts of replacement power and funding the costs of TMI-2 decontamination), the Commission acted reasonably within the framework and limitations of its rate-making authority to aid the utilities in their financial recovery from the accident. The Commission's final rate orders set just and reasonable rates and reflect an appropriate balance of investor and consumer interests consistent with the constitutional protections afforded to both.

Although Met Ed and Penelec are dissatisfied with the particular balance between investor and consumer interests struck by the Commission, that dissatisfaction alone does not give rise to a substantial federal question requiring review by this Court. Absent a clear conflict with some specific federal constitutional protection, and there is none in this case, the courts will not substitute their social and economic judgment for those of the expert bodies to whom such matters have been entrusted. *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963). In affirming the Commission's rate determinations, the Pennsylvania Supreme Court correctly applied the relevant constitutional standards and, therefore, its final judgment requires no further consideration of this Court.

Argument

CONCLUSION

For the foregoing reasons, the Pennsylvania Public Utility Commission respectfully moves that the appeal should be dismissed or, in the alternative, that the decision below should be affirmed.

Respectfully submitted,

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